No. [redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1990

GENE MCNARY, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, *et al.*,
Petitioners,

v.

HAITIAN REFUGEE CENTER, INC., *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 90 national and international labor organizations with a total membership of 14 million working men and women, files this brief *amicus curiae* in support of respondents Haitian Refugee Center *et al.* with the consent of the parties as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

Petitioners' argument that Congress intended the specialized review provisions of 8 U.S.C. § 1160(e) to divest federal district courts of their jurisdiction, under 28 U.S.C. § 1331 and 8 U.S.C. § 1329, to review constitutional or statutory challenges to the Immigration and Naturalization Services' ("INS") regulations and policies implementing the legalization provisions of the Immigration Reform and Control Act of 1986 ("IRCA") is unsound, as we show in a four-part argument.

In Part I, we examine the plain language and structure of 8 U.S.C. § 1160(e), showing that Congress intended IRCA's specialized review provision to encompass only individual, fact-based denials of legalization applications. This is demonstrated by Congress' use of the term "determination," its singular reference to "an" application, its narrow "abuse of discretion" standard of judicial review and its express incorporation of 8 U.S.C. § 1105a, which has consistently been construed by the courts as *not* precluding district court jurisdiction over legal challenges to INS policies and regulations. Pp. 5-11, *infra.*

In Part II, we show that the policies underlying IRCA's specialized review provision are *furthered* by permitting district court review of legal challenges to the INS' legalization policies, because the availability of injunctive relief at the start of the statutory application period allows for prompt resolution of such chal-

lenges, which otherwise would overwhelm the administrative and judicial system if individually litigated with no right of judicial review until an order of deportation has issued. Pp. 11-17, *infra*.

In Part III, we demonstrate that petitioners' contrary approach conflicts with Congress' policy of encouraging eligible aliens to apply for legalization by promising them confidentiality in their applications and employment authorization if the applicant can demonstrate *prima facie* eligibility and thereby compromises the ability of such aliens to obtain lawful employment pending final adjudication of their applications. Pp. 18-22, *infra*.

Finally, in Part IV, we show that petitioners' burden is to provide clear and convincing evidence of a congressional intent to include legal challenges to INS policies and regulations within the compass of IRCA's specialized review provision, not only because of the substantial procedural hurdles that petitioners' approach would place on aliens seeking review of such policies and regulations, but also because that approach would preclude judicial review altogether for many categories of claimants—including Qualified Designated Entities, individual aliens who were prevented from filing legalization applications because of the INS's unlawful legalization policies and individual aliens who were denied employment authorization based on such unlawful policies during the lengthy pre-application period. Pp. 22-30, *infra*.

ARGUMENT

Shortly after the enactment of the Immigration Reform and Control Act of 1986, petitioners adopted a series of regulations and policies implementing the legalization provisions of that Act. Many of those regulations and policies were successfully challenged in federal district court lawsuits for injunctive and declaratory relief, often on a class-wide basis.

The district courts asserted jurisdiction over those suits under 28 U.S.C. § 1331 (federal question jurisdiction) and/or 8 U.S.C. § 1329 (jurisdiction over "all causes . . .

arising under any of the provisions of" the subchapter of the Immigration and Nationality Act ("INA") that came to include IRCA).[1]

[1] In the great majority of these cases, plaintiffs prevailed on the merits and obtained injunctive relief prior to the deadline for filing legalization applications—which for regular applicants was May 4, 1988 and for SAW applicants was November 30, 1988. *See, e.g., Ayuda, Inc. v. Meese*, 687 F. Supp. 650, 700 F. Supp. 49 (D.D.C. 1988), *vacated in part*, 880 F.2d 1325 (D.C. Cir. 1989), *pet. for cert. pndg.*, No. 89-1018 (enjoining INS regulation that denied eligibility under "known to the government" standard of 8 U.S.C. § 1255a(2)(B) to persons whose unlawful status was known to agencies other than the INS or whose unlawful status resulted from failure to file periodic address reporting forms); *Farzad v. Chandler*, 670 F. Supp. 690 (N.D. Tex. 1987) (same re known to other agencies); *Immigrant Assistance Project v. INS*, 709 F. Supp. 998, 717 F. Supp. 1444 (W.D. Wash. 1989), *appeal stayed pndg. McNary decision*, Nos. 89-35345, 89-35593 (same re address reporting forms); *Catholic Social Services, Inc. v. Thornburgh*, 664 F. Supp. 1378 (E.D. Cal. 1987), *appeal of subsequent order stayed pndg. McNary decision*, Nos. 88-15046, 88-16127, 88-15128 (9th Cir. 1990) (enjoining INS regulation that denied eligibility to aliens who traveled outside the country after November 6, 1986 without obtaining advance permission from the INS); *LULAC v. INS*, No. 87-4757-WDK (C.D. Cal. 1988), *appeal stayed pndg. McNary decision*, No. 88-15046 (9th Cir. 1990); (enjoining INS regulation that denied eligibility to aliens who traveled outside the country and returned with a visa prior to November 6, 1986); *Zambrano v. INS*, No. S-88-455 (E.D. Cal. 1988), *appeal stayed pndg. McNary decision*, Nos. 88-15438, 88-15533 (enjoining INS regulation that denied eligibility to aliens if an immediate family member received "public cash assistance"); *Perales v. Meese*, 685 F. Supp. 52 (S.D.N.Y. 1988) (same); *Vargas v. Meese*, 682 F. Supp. 591 (D.D.C. 1987) (enjoining INS regulation requiring SAW applicants filing from within the United States to have entered country before June 26, 1987); *see also Doe v. Nelson*, 703 F. Supp. 713 (N.D. Ill. 1988) (court has jurisdiction over challenge to INS regulation barring legalization applications by aliens apprehended by the INS unless they filed within 30 days after start of application period); *United Farmworkers v. INS*, No. 87-1964-LKK (E.D. Cal. 1988) (settlement of challenge to INS procedures for adjudicating SAW applications in parallel case to *HRC v. McNary* for Northern and Western regions of INS). In many of those cases, the INS either entered into settlement agreements as to one or all of the claims asserted (*e.g., Catholic Social Services, United Farm-*

The common theme among these cases was that *all* challenged, on constitutional or statutory grounds, substantive or procedural policies that the INS had instructed its Legalization Offices ("LOs"), Regional Processing Facilities ("RPFs") and Legalization Appeals Unit ("LAU") to follow in adjudicating individual legalization applications. In *none* did plaintiffs seek a determination on a discrete legalization application. Rather, plaintiffs sought only to assure that their legalization applications *would be administratively adjudicated* under standards that were constitutionally valid and statutorily correct.

Petitioners argue that 8 U.S.C. § 1160(e) was intended to divest the district courts, in the legalization context, of their traditional jurisdiction over legal challenges to INS regulations and policies. Petitioners are wrong. For the reasons set forth below, we submit that the Eleventh Circuit in the present case and the district courts in the cases cited *supra* at p. 3 n.1 properly construed 8 U.S.C. § 1160(e)—and its jurisdictional counterpart for non-SAW legalization applicants, 8 U.S.C. § 1255a(f)[2]—as not precluding district court jurisdiction over challenges to the INS' legalization policies. Even if petitioners were not required to demonstrate "clear and convincing evidence" of Congress' intent to divest the district courts of their traditional jurisdiction over such challenges—and in Part IV we show that petitioners do have that burden—the plain language and structure of IRCA's specialized review provisions and the legislative policies those provisions were designed to further establish that the district courts do have jurisdiction over such challenges.

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workers), or did not appeal the merits as to one or more such claims (*e.g., Ayuda, LULAC, Zambrano, Catholic Social Services, Immigrant Assistance Project*).

[2] 8 U.S.C. § 1160(e)(1) is the specialized review provision governing review of legalization applications filed by Special Agricultural Workers ("SAWs"). IRCA establishes a nearly identical review procedure for legalization claims by applicants other than SAWs in 8 U.S.C. § 1255a(f)(1). Our analysis in the text applies equally to both sections.

I. THE PLAIN LANGUAGE AND STRUCTURE OF IRCA'S SPECIALIZED REVIEW PROVISION DEMONSTRATE THAT CONGRESS DID NOT INTEND THAT PROVISION TO ENCOMPASS LEGAL CHALLENGES TO THE INS' REGULATIONS AND POLICIES.

1. The scope of IRCA's specialized review provision on which petitioners rely is far narrower than petitioners would have it; by its terms, 8 U.S.C. § 1160(e)(1) encompasses only individual, case-by-case review of legalization denials:

> There shall be no administrative or judicial review of *a determination respecting an application* for adjustment of status under this section except in accordance with this subsection. [Emphasis supplied].

The limiting references to "a determination" and "an application" demonstrate Congress' intent to encompass within this specialized review procedure only fact-based challenges to the denial of individual legalization applications.

The first term, "a determination," has long been equated with adjudicative rather than legislative decisionmaking. For example, in *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986), this Court upheld district court jurisdiction over a challenge to regulations promulgated under part B of the Medicare program, notwithstanding the specialized review provision in 42 U.S.C. § 1395ff(b)(1)(C) covering "any determination . . . as to . . . the amount of benefits," which limits district court review of such a determination. *Bowen* did so on the ground, *inter alia*, that this Medicare review provision "simply does not speak to challenges mounted against the *method* by which such amounts are to be determined rather than the *determinations* themselves." 476 U.S. at 675 (emphasis in original).[3]

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[3] *See also id.* at 679 n.8 (rejecting the Government's argument that the challenged regulation is a "decision of the Secretary" within the meaning of 42 U.S.C. § 405(h)).

Similarly, the statutory reference in 8 U.S.C. § 1160(e) to "an application," in the singular, speaks the language of case-by-case adjudication rather than wholesale rulemaking. The same is true of the specialized review provision as a whole.[4]

Giving these terms their accepted common sense meaning, 8 U.S.C. § 1160(e) cannot be stretched to encompass legal challenges to the INS' underlying legalization policies, which have a widespread impact upon *all* applicants and potential applicants for legalization.[5] Simply stated, such legal challenges can be adjudicated wholly without reference to the disposition of any particular individual's legalization application.

Had Congress intended 8 U.S.C. § 1160(e) to be more broadly inclusive, statutory language to plainly express such an intent was readily at hand. For example, Congress could have modeled 8 U.S.C. § 1160(e) on the more expansive language of 8 U.S.C. § 1329—the general grant of district court jurisdiction under Title II of the INA—by channeling into IRCA's specialized legalization review procedures "all causes . . . arising under any of the provisions of [the legalization program]." Or Congress could have modeled IRCA's specialized review provision on 38

[4] *See, e.g.*, 8 U.S.C. § 1160(e)(2)(A), § 1255a(f)(3)(A) (mandating a single level of administrative review of "*such* a determination") (emphasis supplied); 8 U.S.C. § 1160(e)(2)(B), § 1255a(f)(3)(B) ("such administrative appellate review shall be based solely upon the administrative record established at the time of the determination on *the* application. . . .") (emphasis supplied); 8 U.S.C. § 1160(e)(3), § 1255a(f)(4)(A) ("There shall be judicial review of *such a denial* only in the judicial review of an order of exclusion or deportation under Section 1105a of this title") (emphasis supplied); H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1 at 74 (1986) ("The bill provides for limited administrative and judicial review of denials of applications for legalization.").

[5] *See Ayuda, Inc. v. Thornburgh, supra*, 880 F.2d at 1349 (Wald, C.J., dissenting) ("To the ordinary reader, . . . this phrase . . . appears to cover only the determinations that are made with respect to each application . . . .").

U.S.C. § 211(a), which governs review of veterans' benefits claims, by broadly referring to "[review] on any question of law or fact under [the legalization program]." Or at the very least, Congress could have adopted the Senate's original version of this language, which broadly referred to "review (by class action or otherwise) of a decision or determination under this section." But Congress chose none of these readily available options, and indeed, the Senate's proposed language was expressly *rejected* in Conference.[6]

2. The statutory language of IRCA's remaining judicial review provisions buttresses the foregoing reading of 8 U.S.C. § 1160(e)(1). Thus, 8 U.S.C. § 1160(e)(3)(B) provides that judicial review

> *shall be based solely upon the administrative record* established at the time of the review by the appellate authority and *the findings of fact and determinations contained in such record shall be conclusive* unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and

[6] As explained by the Senate Judiciary Committee, this broad language was intended to preclude all "judicial review of a decision or determination made with respect to the legalization program." S. Rep. No. 132, 99th Cong., 1st Sess. at 48 (1985).

The reference to "this section" in the Senate bill had the effect of including within the ban on judicial review the statutory provision in that section of the Act authorizing the Attorney General to promulgate regulations necessary for the legalization program. *See* S. 1200, 99th Cong., 1st Sess. § 202(f)(1), (g)(1) (1985).

The Conference rejected this broad provision in favor of the more limited House bill, which differed from the Senate version in three principal respects: 1) it did not include the broad reference to "decision or" determination; 2) it did not include an express ban on class actions; and 3) it did not refer to "this section" and or to the provision in that section of the Senate bill for Attorney General rulemaking. Indeed, in the final version of IRCA, the Attorney General's legalization program rulemaking authority (8 U.S.C. § 1255a(g)) is not even mentioned until *after* the specialized review provisions (8 U.S.C. § 1160(e), § 1255a(f)), thus further indicating that this rulemaking was *not* subject to those specialized review provisions.

> convincing facts contained *in the record* considered as a whole. [Emphasis supplied].

This provision bespeaks an understanding that this judicial review procedure would apply only to claims that have been subjected to administrative consideration and that would therefore result in the creation of an "administrative record." But the single-level of administrative review established by IRCA cannot resolve constitutional and statutory challenges to the validity of the INS' legalization policies. Rather, the LAU is bound by the INS' policy decisions, and IRCA provides no right of review from an LAU determination to the INS itself.[7]

Moreover, the "abuse of discretion" standard of judicial review under 8 U.S.C. § 1160(e)(3)(B) makes no sense for constitutional or statutory challenges. While that standard is a rational one for judicial review of an administrative adjudication of the *facts* of an individual legalization application, it is plainly unsound to place such stringent limits on the judiciary in deciding constitutional or statutory challenges to the INS' underlying

[7] *See Ayuda, Inc. v. Thornburgh, supra*, 880 F.2d at 1332 n.7 ("Facial challenges to the regulation [in a proceeding before the LAU] are not permitted"); *Matter of Fede*, Interim Dec. 3106 at 2-3 (BIA 1989) and cases cited ("A regulation promulgated by the Attorney General has the force and effect of law as to this Board and immigration judges, and neither has any authority to consider challenges to regulations implemented by the Attorney General, any more than there is authority to consider constitutional challenges to the laws we administer."); Pet. App. 13a.

There does not appear to be a single case in which the LAU has reversed a legalization denial on the basis of a constitutional due process argument or a claim that the INS' policies or regulations are contrary to law. Nor would there be any such Board of Immigration Appeals ("BIA") decision, even from review of a denied legalization applicant's deportation order, since IRCA provides that the LAU's decisions with respect to legalization applications may not be reopened or reviewed. *See* 8 C.F.R. § 103.3(a)(2)(iii) ("No further administrative appeal shall lie from this decision, nor may the application be filed or reopened before an immigration judge or the Board of Immigration Appeals during exclusion or deportation proceedings.").

legal standards. *Compare* 5 U.S.C. § 706(2)(A); *cf.* 2 S. Childress & M. Davis, *Standards of Review* § 17.2 at 335-36 (1986).

3. Congress' incorporation into IRCA's specialized review provisions of § 106 of the INA, 8 U.S.C. § 1105a—which governs direct appellate review of final deportation orders—is further evidence that Congress intended to preserve district court review over challenges to INS regulations and policies under the legalization program. IRCA provides, with respect to administrative denials of legalization applications, that "[t]here shall be judicial review of such a denial only in the judicial review of an order of deportation [and in the context of SAWs, exclusion] under Section [106 of the INA, 8 U.S.C. §]1105a." 8 U.S.C. § 1255a(f)(4)(A), § 1160(e)(3)(A).[8] And § 106 has *consistently been interpreted to permit* district court review of legal challenges to INS policies, even when those policies could ultimately give rise to a deportation order.[9] To be sure, petitioners now

[8] This section provides, *inter alia*, that jurisdiction to review "final orders of deportation" is vested exclusively in the courts of appeals, and that petitions for such review must be filed within six months of the date of the final deportation order.

[9] *See, e.g., Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1033 (5th Cir. 1982); *Jean v. Nelson*, 727 F.2d 957, 979-81 (11th Cir. 1984) (en banc), *aff'd on other grounds*, 472 U.S. 846 (1985); *Salehi v. District Director*, 796 F.2d 1286, 1290 (10th Cir. 1986); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 364 (C.D. Cal. 1982); *National Center for Immigrants' Rights, Inc. v. INS*, 743 F.2d 1365, 1368-69 (9th Cir. 1984), *vac. on other grounds*, 481 U.S. 1009 (1987), *reaff'd on remand*, —— F.2d —— (9th Cir. 1990); *Hotel & Restaurant Employees Union v. Smith* 563 F. Supp. 157, 162 (D.D.C. 1983), *summary judgment granted for defendant*, 594 F. Supp. 502 (D.D.C. 1984), *aff'd by an equally divided court*, 846 F.2d 1499 (D.C. Cir. 1988); *Abdelhamid v. Ilchert*, 774 F.2d 1447, 1450 (9th Cir. 1985); *see also Cheng Fan Kwok v. INS*, 392 U.S. 206, 210 (1968) ("In situations to which the provisions of § 106(a) are inapplicable, the alien's remedies would, of course, ordinarily lie first in an action brought in an appropriate district court."). This Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983), is not to the contrary. *Chadha*

contend that these § 106 cases were wrongly decided. Pet. Br. at 28. But even assuming that is true (which we deny), petitioners' answer is unresponsive. For the question here is the *1986 Congress' intent*, and the key to that intent is that Congress must be presumed to have legislated on the basis of the longstanding, consistent judicial construction absent any persuasive indication to the contrary. "[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 782 n.15 (1985), *quoting Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978).

Petitioners argue too that whatever the proper scope of the term "final order" under § 106, IRCA provides that "a determination respecting an application" is to be considered a "final order" within the meaning of § 106. But we do not contend that an IRCA regulation or policy that constitutes "a determination respecting an application" is reviewable in district court. Rather, we argue that Congress' decision to adopt the machinery of § 106 (along with the uniform body of case law interpreting that provision) informs the meaning of "a determination respecting an application." In light of that case law, the adoption of § 106 demonstrates that Congress did *not* intend the INS' legalization regulations and policies to be encompassed within the scope of IRCA's specialized review provision. Those policies and regulations exist separate and apart from any specific individual adjudication, and therefore can be reviewed

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simply stands for the proposition that an individual alien subject to an outstanding deportation order *may* challenge in the courts of appeals any determination on which the order is contingent. *Chadha* does not preclude district court review of such determinations *prior* to the initiation of deportation proceedings, and indeed, does not even address the issue. See *Ayuda, Inc. v. Thornburgh*, *supra*, 880 F.2d at 1335, 1337; *id.* at 1358 (Wald, C.J., dissenting); *Cheng Fan Kwok v. INS*, *supra*, 392 U.S. at 216.

where there has been *no* "determination respecting an application" in an individual case.[10]

In short, where plaintiffs challenge an INS regulation or policy implementing the legalization provisions of IRCA rather than "a determination respecting an application for adjustment of status," by their terms the specialized review procedures of IRCA do *not* apply.[11]

II. THE LEGISLATIVE GOALS UNDERLYING IRCA'S SPECIALIZED REVIEW PROVISION ARE ENHANCED, RATHER THAN UNDERMINED, BY PERMITTING DISTRICT COURT REVIEW OF LEGAL CHALLENGES TO THE INS' REGULATIONS AND POLICIES.

The point of 8 U.S.C. § 1160(e)(1) is to channel legalization claims into a specialized administrative procedure that will resolve those claims efficiently and accurately while protecting the federal courts from being overrun with claims brought by disappointed legalization applicants seeking to delay their deportation by relitigating the denial of their legalization applications. *See, e.g.*, S. Rep. No. 132, *supra*, at 48 (Senate Judiciary Com-

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[10] Petitioners contend that until an actual individual claim is adjudicated, plaintiffs' challenge to an INS legalization regulation or policy would be "abstract" and unrelated to any "agency action." Pet. Br. at 19-20, *citing Lujan v. National Wildlife Federation*, 110 S.Ct. 3177 (1990). But *Lujan* did not reject the longstanding principles governing pre-enforcement review of agency actio.; it merely applied them to the unique facts of that case. *See* 110 S.Ct. at 3190; *Abbott Laboratories v. Gardner*, 387 U.S. 136, 139-41 (1967) (pre-enforcement review permissible absent "persuasive reason to believe" that Congress meant to preclude it).

[11] That is not to say that an individual alien who eventually benefits from a district court challenge to INS legalization policies would be wholly exempted from those administrative procedures. To the contrary, in this case as in the others cited *supra* at p. 3 n.1, those individuals would merely be placed back into the administrative system, with their individual cases considered under the proper agency procedures. *Compare Bowen v. City of New York*, 476 U.S. 467, 485 (1986); *United Auto Workers v. Brock*, 477 U.S. 274, 287-88 (1986).

mittee Report on Simpson immigration bill, which noted the committee's concern "that efforts will be made, on behalf of many persons who are ineligible for the legalization program, to delay the final determinations of their applications. This would prevent not only their own deportation but the expeditious operation of the program for others").[12] While Congress recognized that some legalization claims would undoubtedly reach the courts on review of orders of deportation (and exclusion, in the case of SAWs), the specialized review procedure was designed to winnow out many such claims, and to ensure, when and if judicial review was sought, that a detailed administrative record would have been created, both to facilitate appellate review and to justify the deferential standard of review that Congress had provided.

All of this is sound policy as applied to individual, fact-specific challenges to legalization denials. Most such claims can be resolved administratively at the LAU level by experienced administrative decisionmakers who can quickly evaluate whether the LO or RPF correctly applied the INS' legalization guidelines to the facts of each individual case. The burden on the courts will thereby be substantially decreased, both because those claims will be channeled into the administrative procedure in the first instance, and because, given the deferential standard of review, the time required (and in many instances, the necessity) for appellate review will be greatly diminished.

However, it is apparent that these same goals are *not* furthered—and there is *no* indication that Congress thought otherwise—by requiring constitutional and statutory challenges to be funnelled into that specialized review procedure as well. This is true for four reasons.

First, the administrative appeal procedure cannot "winnow" out claims that the LAU lacks power to re-

[12] Similar concerns underlie other statutory limitation-of-judicial-review provisions. *See, e.g., Foti v. INS*, 375 U.S. 217, 224 (1963); *Johnson v. Robison*, 415 U.S. 361, 370 (1974).

solve; those claims could eventually reach the courts of appeals regardless of any preliminary administrative consideration.

Second, such a requirement would increase the number of cases in the judicial system generally, because the district courts would be unable to resolve broad-based legal challenges to the INS' regulations and policies by issuing class-wide or injunctive relief where appropriate.

Third, the administrative process would itself face a far greater docket of legalization appeals; not only because the hundreds of thousands of aliens affected by the challenged INS policies could file claims challenging their wrongful denials, but also because a court order requiring reconsideration could not come until the end of the administrative process (rather than at the beginning, as occurred in many cases where prompt injunctive relief was obtained from the district courts), thus requiring reconsideration of all these same cases.

Finally, the effectiveness of court of appeals review would be diminished, because preliminary consideration of the legal challenge would be conducted by an administrative body that lacks authority to consider the challenge and the capacity to make a proper record, rather than by a district court that can review the challenge, engage in necessary fact-findings, and narrow the issues for appellate review.[13]

[13] Petitioners suggest that permitting district court review of such challenges creates an "anomaly" because the courts of appeals would hear only the less important cases involving the application of the statute in individual cases, while the district courts would review the more significant cases involving broad questions affecting a whole class of aliens. Pet. Br. at 14. This is a wholly specious comparison. These broad legal challenges, like any other civil claim, would initially be brought in district court. The more narrow, fact-specific claims would initially be brought to the LAU. However, both types of challenges would receive court of appeals' attention. The only difference is that the more important cases involving challenges to regulations and policies would receive initial consideration from a *federal court* that has extensive expertise and appropriate procedures for resolving such

1. It is estimated that more than 200,000 aliens have legalization claims affected by the INS policies at issue in the cases cited *supra* at p. 3 n.1.[14] While many of those claims have not yet been administratively adjudicated (since appellate review of certain district court injunctions has been stayed pending this Court's decision),[15] in a great many instances the courts were able to resolve plaintiffs' claims by enjoining the INS' challenged legalization policies *prior* to the expiration of the statutory application period, thus allowing affected aliens to apply for legalization and be granted relief under the proper constitutional and statutory standards. Under petitioners' construction, however, virtually none of those aliens' claims could yet have been resolved, since the vast majority of such claims would have been denied at the LO level, thrown into a futile administrative process, and then many years later would begin to appear on the docket sheets of the federal courts of appeals in separate, individual deportation cases.[16] Eventually thousands of

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issues, and the less important challenges would receive initial consideration from the administrative body expert in such matters.

[14] *See INS Loses Again on "Known to the Government,"* 65 Interp. Releases 334, 335 (1988); *Amnesty Lawsuit Seeks Change in Public Charge Definition,* 65 Interp. Releases 376 (1988); *Three Courts Extend Legalization Deadlines, Distinguish Pangilinan,* 65 Interp. Releases 818 (1988); *Government Seeks 90-Day Cap on Late Filings in CSS and LULAC Amnesty Cases,* 67 Interp. Releases 923, 924 (1990); Pet. Br. at 30, 31 n.24.

[15] This is true, for example, of more than 75,000 claims in *Ayuda, Inc. v. Thornburgh, Catholic Social Services v. Thornburgh, LULAC v. INS* and *Zambrano v. INS,* all cited *supra* at p. 3 n.1. *See* Pet. Br. at 31 n.24; 65 Interp. Releases, *supra,* at 819.

[16] *See Ayuda, Inc. v. Thornburgh, supra,* 880 F.2d at 1330 ("If denials of legalization are appealed to the courts of appeals only after subsequent deportation orders, it would take a good deal more time to gain a judicial judgment on the legality of the INS's interpretation . . . ."); *id.* at 1356 (Wald, C.J. dissenting) ("judicial review of the first wave of applications would almost certainly not take place until long after the 12-month [application] period had lapsed."). As of mid-September 1980 we are aware of only three published court of appeals decisions concerning legalization denials.

such cases would clog the courts of appeals—including the more than 20,000 cases affected by the Eleventh Circuit's ruling below—all presenting identical legal challenges that could have been disposed of in a single, timely-resolved district court proceeding.

2. Petitioners' construction would also burden the courts of appeals by providing an inadequate underlying record. Forcing constitutional and statutory challenges into IRCA's special review procedures, and thus precluding first-tier district court review, would result in the courts of appeals having to proceed without an adequately developed evidentiary record and without the benefit of another decisionmaker's evaluation of the challenge.[17] This case, for example, raises due process issues requiring extensive factual analysis under *Mathews v. Eldridge,* 424 U.S. 319 (1976). See Pet. App. 13a-17a. The LAU could not consider those issues and therefore would not be in a position to oversee discovery or develop a record as to the underlying due process facts (particularly to the extent the facts concern systemic issues). Ac-

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In part, the delay in obtaining judicial review is due to the fact that while IRCA was enacted on Nov. 6, 1986, no SAW applicant would file for legalization until June 1, 1987. Even then, the alien could not obtain judicial review until the application was denied, the administrative appeal was exhausted and deportation proceedings were initiated and concluded. Meanwhile, because of the relatively short window period for filing legalization applications, the great majority, if not all, of the legalization applications under IRCA would already have been decided at the LO level, long before any court of appeals ruling. *Compare Heckler v. Ringer,* 466 U.S. 602, 619, 627 (1984) (benefit claims under the Medicare Act are filed on an ongoing basis, and judicial review could be obtained before most such claims have been filed).

[17] While the LAU is required to provide a written statement explaining its reasons for denying a legalization application (8 C.F.R. § 103.3(a)(2)(i), it could either cite the unlawful policy or regulation or summarily dismiss on the ground that, in light of the settled INS policy and the LAU's limited authority, the claim was "patently frivolous." *See* 8 C.F.R. § 103.3(a)(2)(iv).

cordingly, absent preliminary district court consideration, the courts of appeals would be forced either to make the record themselves or to decide the underlying issues purely on a paper record—a result that Congress can be presumed not to have intended.

3. Petitioners' approach would also impose a substantial and wholly unnecessary burden on the administrative process. Given the long delays inherent in the specialized review process, by the time the various courts of appeals could rule on the merits of individual claimants' challenges to the underlying INS policies, hundreds of thousands of aliens would have been processed under those identical policies. Assuming that the appropriate appropriate legal standard, if petitioners' position were remedy would be a new administrative hearing under the accepted the result would be that the LAU would have to review each of the hundreds of thousands of applications twice: first when the alien was denied legalization as a result of the INS' unlawful policy and then again on remand from the courts of appeals.

4. Permitting district court review of challenges would not impose a countervailing burden on those courts. Despite the approximately 3.1 million claims for legalization filed since the enactment of IRCA,[18] less than 30 district court lawsuits have been filed challenging the INS' legalization policies. See Pet. for Cert. at 28. While some of those cases have been time-consuming, the overall demand on judicial resources does not come close to the enormous burden on the courts of appeals that would result under petitioners' approach, which would send virtually all of the underlying claims in those cases separately to the courts of appeals.[19]

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[18] *See* INS Provisional Legalization Statistics (Jan. 9, 1990).

[19] *Compare Bowen v. Michigan Academy of Family Physicians, supra,* where the Court addressed the inundation argument by stating:

> We do not believe that our decision will open the flood gates to millions of Part B Medicare claims. Unlike the *determinations* of amounts of benefits, the *method* by which such amounts are determined ordinarily affects vast sums of money and thus differs qualitatively from the "quite minor matters" review of which Congress confined to hearings by carriers. In addition, as one commentator pointed out, "permitting review only [of] . . . a particular statutory or administrative standard . . . would not result in a costly flood of litigation, because the validity of a standard can be readily established, at times even in a single case." Note, 97 Harv. L. Rev. 778, 792 (1984) (footnote omitted). [476 U.S. at 676, 680 n.11.]

Petitioners contend that *Bowen* is inapposite because the issue there was whether Congress had completely precluded federal court jurisdiction. Pet. Br. at 22. But even if that were a distinguishing factor, which we dispute for the reasons set forth *infra*, at 22-24, it would not affect the validity of this Court's common sense observation about the flow of litigation entering the federal courts. *Accord, Johnson v. Robison, supra,* 415 U.S. at 373 (similar statutory policies under the Veterans Act are not furthered by construing the preclusion-of-judicial review language to apply to constitutional challenges); *Traynor v. Turnage,* 485 U.S. 535, 544 (1988).

[20] *See* S. Rep. No. 132, *supra,* at 48.

[21] Petitioners point to a few instances in which district courts, having found an INS legalization policy to be unlawful, have or-

5. Finally, permitting district court review of broad IRCA legal challenges would *not* result in the delays that prompted Congress to restrict judicial review over individual legalization application denials. Congress' concerns with delay in IRCA had nothing to do with the prospect of class action suits challenging INS regulations, but rather with the prospect of disappointed individual applicants relitigating the factual basis of their unsuccessful applications, both before and after a deportation order has been issued.[20] Under petitioners' approach, the overall delays would be considerably longer, since the courts of appeals would be clogged with individual legalization cases that could have been resolved through a handful of district court actions for injunctive, class-action relief. Any concern Congress may have had about flooding the district courts with individual cases raising factual challenges simply has no bearing on the type of issue raised by the present category of claims.[21]

III. PETITIONERS' APPROACH IS INCONSISTENT WITH CONGRESS' GENERAL GOAL OF ENCOURAGING EACH ELIGIBLE ALIEN TO APPLY FOR LEGALIZATION BY PROVIDING PROMPT, ACCURATE INFORMATION, AN ASSURANCE OF CONFIDENTIALITY, AND THE RIGHT TO EMPLOYMENT AUTHORIZATION PENDING A DETERMINATION ON THEIR APPLICATION.

Petitioners' construction of 8 U.S.C. § 1160(a) is also inconsistent with the broader congressional statutory goal of maximizing participation in the legalization program. In enacting IRCA, Congress "intend[ed] that the legalization program should be implemented in a liberal and generous fashion . . . to ensure true resolution of the problem. . . ." H.R. Rep. No. 682, *supra*, at 72 (1986). A "generous program" of legalization was deemed "essential" if the United States was to make progress on immigration reform. *Ibid.*

Congress recognized that many aliens would be hesitant to come forward and take advantage of the legalization program because of their natural suspicion of the INS and their acute fear of deportation. Accordingly, to maximize participation in the program, Congress took special pains to assure: 1) that prompt and accurate information about the program and its eligibility criteria would be widely disseminated by the QDEs and the Attorney General;[22] 2) that all applications would be submitted and considered in confidence, and that the information in those applications would never be used

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dered the legalization filing period to remain open until affected individuals have had a chance to submit applications. Pet. Br. 31 n.24. But those courts acted appropriately given the facts before them. *See generally In re Thornburgh*, 869 F.2d 1503 (D.C. Cir. 1989), and its discussion of *INS v. Pangilinan*, 486 U.S. 875 (1988). In any event, delays resulting from unconstitutional or otherwise unlawful agency action were not the type of delays with which Congress was concerned in enacting 8 U.S.C. § 1160(e) and § 1255a(f).

[22] *See* 8 U.S.C. § 1255a(c)(2)(A)(i); H.R. Conf. Rep. No. 1000, 99th Cong., 2d Sess. at 92-93 (1986).

against the alien in a deportation proceeding;[23] and 3) that all aliens who came forward and could demonstrate *prima facie* eligibility for legalization would be granted statutory "employment authorization" pending a final determination on their claims, an essential right in light of the new employer sanctions provisions of the Act.[24] All three of these statutory protections would be directly undermined by petitioners' approach.

Congress in enacting IRCA was aware that many unlawful aliens to whom legalization was being offered were fearful of the government, particularly the INS, and concerned that once they came "out of the shadows" and made known their presence in this country, they would risk deportation.[25] To overcome this fear—which was seen as the greatest impediment to successful implementation of the legalization program—Congress created special "buffer" agencies, the Qualified Designated Entities, most of which were church groups, labor unions, and other community organizations. The QDEs' statutory role was to act as an intermediary between the INS and the immigrant community, to provide the alien community with accurate information about the legalization program and to help potentially eligible aliens proceed through the legalization process.[26]

Toward this end, Congress also enacted strict confidentiality protections in IRCA. As the House Judiciary Committee Report explained:

> The Committee hopes that by working through the voluntary agencies, the Attorney General might be

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[23] *See* 8 U.S.C. § 1255a(c)(5).

[24] *See* 8 U.S.C. § 1160(d)(1)(B), (2)(B), § 1255a(e)(1)(B), (2)(B).

[25] *See, e.g.*, H.R. Rep. No. 682, *supra*, at 73 ("The Committee has learned that legalization programs in other countries have usually produced a low rate of participation among the eligible candidates. At least part of the reason is distrust of authority and lack of understanding among the undocumented population.").

[26] *See, e.g.*, H.R. Rep. No. 682, *supra*, at 73; H.R. Conf. Rep. No. 1000, *supra*, at 92-93.

able to encourage participation among undocumented aliens who fear coming forward. To assist in this endeavor, the bill authorizes the Attorney General to fund outreach services and provides for an extensive education and outreach program prior to the application period.

The files and records kept by the [QDE] organizations are confidential, and not accessible to the Attorney General or any other governmental entity. The applicant must consent to the application being forwarded for official processing. The confidentiality of the records is meant to assure applicants that the legalization process is serious, and not a ruse to invite undocumented aliens to come forward only to be snared by the INS. [H.R. Rep. No. 682, *supra*, at 73].[27]

Not only would petitioners' approach force applicants to decide whether to file their legalization applications long before they could have any hope of obtaining a judicial determination of the validity of the INS' legalization regulations, but more importantly, petitioners' approach would largely eliminate the benefits of the confidentiality provision. If judicial review of the INS' policies could only be obtained on review of an order of deportation, each alien seeking to challenge an INS policy would individually be required to waive confidentiality by voluntarily submitting to a deportation proceeding as a precondition to obtaining judicial review.[28]

[27] IRCA provides that the "files and records of qualified designated entities with respect to filing an application . . . are confidential" and unavailable to the Attorney General or INS "without the consent of the alien." 8 U.S.C. § 1255a(c)(4). IRCA also provides that "[n]either the Attorney General, nor any other official or employee of the Department of Justice, or bureau or agency thereof" may use any information contained in a legalization application "for any purpose other than to make a determination on the application," and the statute imposes criminal penalties on anyone who unlawfully "uses, publishes, or permits [such] information to be examined." 8 U.S.C. § 1255a(c)(5). *See also* S. Rep. No. 132, *supra*, at 47 (confidentiality provisions seek "to assure applicants that they may apply to such entities without fearing that their applications will be forwarded to the INS even if in the view of such entities they do not qualify for legalization.").

Under our construction of IRCA, by contrast (and with the exception of the D.C. Circuit in *Ayuda*, the construction of every lower court as well), a legal challenge to the validity of the INS' eligibility guidelines could be litigated without threatening the aliens' statutory right of confidentiality, since such a challenge could proceed on a class-wide basis (or be brought by an institutional plaintiff), without any individual having to disclose any confidential information in a deportation proceeding as a precondition to challenging the INS' policies.[29]

Finally, petitioners' approach would cause irreparable harm to persons entitled to legalization but for an unlawful INS legalization policy, by denying vast numbers of aliens affected by that policy the statutorily-protected right to work lawfully in this country, and thereby support themselves and their families, pending review of their legal challenge by a court of appeals. Under IRCA, employment authorization—*i.e.*, the right to work lawfully—is available to any applicant or potential applicant who can establish a *prima facie* or non-frivolous claim of eligibility for legalization. 8 U.S.C.

[28] Because an Order to Show Cause cannot issue unless the INS can state a precise ground for deportation (8 C.F.R. § 242.1(b)), an alien seeking to obtain judicial review of a legal challenge would be required to provide the same information concerning unlawful status that was contained in his or her confidential application.

[29] The advantages of class relief and injunctive relief in cases challenging policies and regulations is well-established, and Congress should not be assumed to have eliminated that protection absent evidence to the contrary. *See, e.g., Califano v. Yamasaki*, 442 U.S. 682, 699-701 (1979) (presuming Congress intended class actions to be available absent statutory language to the contrary, and noting many reasons why the class action device may be appropriate in benefits litigation). As noted *supra* at 7 n.6, Congress in the final version of IRCA *eliminated* language in the Senate bill that would expressly have prohibited class action challenges to legalization policies.

§ 1160(d)(1)(B), (2)(B), § 1255a(e)(1)(B), (2)(B). Given the lengthy delays that petitioners would build into the system before a legal challenge to the INS' immigration policies could be adjudicated, large numbers of aliens who are ineligible for legalization solely as a result of an unlawful INS poicy would be precuded from working and thereby contributing to the support of their families, until their cases were finally resolved upon review of an order of deportation—a procedure that could take years to complete. This collateral, but very critical, consequence of petitioners' position cuts deeply against that position.[30]

IV. PETITIONERS HAVE BEEN UNABLE TO PROVIDE ANY CLEAR AND CONVINCING EVIDENCE OF CONGRESS' INTENT TO CURTAIL OR PRECLUDE FEDERAL QUESTION REVIEW OF LEGAL CHALLENGES TO THE INS' REGULATIONS AND POLICIES.

The foregoing is more than sufficient to demonstrate that Congress did *not* intend 8 U.S.C. § 1160(e) to strip the district courts of their traditional jurisdiction under 28 U.S.C. § 1331 and 8 U.S.C. § 1329 over constitutional and statutory challenges to the INS' policy-making decisions. That conclusion is strengthened when this case is evaluated under the standard of *Rusk v. Cort*, 369 U.S. 367 (1962), *Abbott Laboratories v. Gardner*, *supra*, 387 U.S. 136, *Bowen v. Michigan Academy of Family Physi-*

[30] *Cf. Mathews v. Eldridge*, *supra*, 424 U.S. at 331 n.11 (applying the "core principle that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered"); *Oestereich v. Selective Service System*, 393 U.S. 233, 243 (Harlan, J., concurring) (Selective Service Act could not bar pre-induction review of facial challenges to statute or regulations because "[t]o withhold pre-induction review in this case would thus deprive petitioner of his liberty without the prior opportunity to present to *any* competent forum—agency or court—his substantial claim that he was ordered inducted pursuant to an unlawful procedure. Such an interpretation . . . would raise serious constitutional problems . . . .").

cians, *supra*, 476 U.S. 667, and *Traynor v. Turnage*, *supra*, 485 U.S. 535. The principle established there is that Congress will *not* be found to have precluded judicial review or to have imposed substantial obstacles to judicial review absent "clear and convincing evidence" of such an intent in the legislative scheme. Petitioners argue that this heightened standard applies only where judicial review is altogether foreclosed. Pet. Br. at 22. But petitioners' attempt to limit the clear-and-convincing-evidence-of-congressional-intent standard in this way is unsound. In any event, petitioners' construction of IRCA's review provision *does* deny judicial review to many categories of claims and claimants under the legalization program.

1. *Rusk v. Cort* is, we believe, dispositive. There, the Court held that "clear and convincing evidence" of an intent to foreclose federal question jurisdiction is required where the alternative federal forum is theoretically available, but highly impractical. In *Rusk*, a United States citizen living abroad had his citizenship revoked in an administrative proceeding. The government claimed that judicial review was available only pursuant to a limited review procedure which provided that former citizens could challenge such revocations by writ of habeas corpus filed from within this country. The Court disagreed that Congress intended to limit review to that special procedure, because "absent clear and convincing evidence that Congress so intended," it should not be presumed that Congress "intended that a native of this country living abroad must travel thousands of miles, be arrested and go to jail in order to attack an administrative finding that he is not a citizen of the United States." 369 U.S. at 375, 380.[31]

[31] *See also Califano v. Yamasaki*, *supra*, 442 U.S. at 693 ("this Court has been willing to assume a congressional solicitude for fair procedures, absent explicit statutory language to the contrary."). While petitioners are correct that *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985), did not discuss this heightened standard (Pet. Br. at 22), that is because the court

Similarly, absent clear and convincing evidence of such an intent in this case, this Court should not presume that Congress intended to require individual legalization claimants, before they could pursue a constitutional or statutory challenge to an INS policy or regulation that precluded (or greatly minimized their prospects of) legalization: 1) to make a futile and costly application for legalization[32]; 2) to appeal the resulting denial to an LAU that lacks authority to consider the merits of their constitutional or statutory claim; 3) to be apprehended by the INS for initiation of deportation proceedings (which the INS in its discretion could choose *not* to initiate—thus precluding judicial review altogether),[33] or to waive confidentiality by voluntarily surrendering to and risking arrest and incarceration by the INS[34]; 4) to be issued an order of deportation and then to file an unsuccessful appeal to the Board of Immigration Appeals[35]; 5) to file for review in the court of appeals; and 6) throughout this entire lengthy period, to be deprived of "employment authorization" under 8 U.S.C. § 1160(d)(2)(B) or 8 U.S.C. § 1255a(e)(2)(B) and therefore have no legal right to work in this country pending the court's final determination. To the contrary, the enormous difficulty and impracticality of that procedure as a mechanism for bringing such a legal challenge provides persuasive evidence that such a procedure was *not* intended by Congress as the exclusive procedure.[36]

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of appeals forum under the Hobbs Act is more practical for APA review of agency fact-finding. *See* 470 U.S. at 744-45.

[32] The cost of filing legalization applications ranged from $185 for an individual to $420 per family. 8 C.F.R. § 103.7(b).

[33] *See, e.g., Matter of Merced*, 14 I&N Dec. 644 (BIA 1974), *aff'd mem.*, 514 F.2d 1070 (5th Cir. 1975); *Lopez-Tellez v. INS*, 564 F.2d 1302 (9th Cir. 1977).

[34] *See* 8 U.S.C. § 1252.

[35] *See* 8 C.F.R. § 3.1(b).

[36] We do not by this argument mean to suggest (nor did the Court in *Rusk*) that federal question jurisdiction (or jurisdiction under 8 U.S.C. § 1329) would be the only way for a claimant to raise such a claim. We see no reason why in appropriate cases after an order of deportation has issued, an individual could not challenge an agency action upon which the order of deportation was contingent under 8 U.S.C. § 1105a. *See INS v. Chadha, supra*, 462 U.S. at 937-39. Although the majority in *Ayuda* suggested that this could result in the courts of appeals receiving two identical challenges to a regulation, one from a district court and the other from the LAU (and in the latter case the appellate court would have to apply the statutory "abuse of discretion" standard under 8 U.S.C. § 1160(e)(3)(B) or § 1255a(f)(4)(B)), that is not true. Because IRCA's review provision does not apply to such challenges in either instance, consequently neither does its standard of review.

2. Viewing respondents' claim in this case categorically—*viz.*, in the context of the many constitutional and statutory challenges to the INS' legalization regulations and policies that have been (or could be) brought—it becomes readily apparent that if "a determination respecting an application" includes agency policymaking decisions respecting the IRCA legalization program, judicial review for many claimants *would* as a practical matter be denied completely. Thus, just as one consequence of petitioners' construction would be to burden the LAU and court of appeals' dockets with claims of individual aliens who were denied legalization on the basis of unlawful agency policies,[37] another consequence would be to deny relief to many thousands of claimants altogether, because they would be completely shut out from the administrative or judicial review procedures. For this reason as well, the presumption of judicial review and the necessity for clear and convincing evidence to overcome the presumption should be required in this case—particularly given the constitutional nature of respondents' claims. *See, e.g., Webster v. Doe*, 486 U.S. 592, 603 (1988).

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[37] As noted *supra*, at pp. 3-4 n.1, the INS has effectively conceded the invalidity of many of its IRCA eligibility regulations, either by not appealing the merits of injunctions against it or by entering into settlement agreements providing plaintiffs with the relief they had sought from the court.

1. Claims By Institutional Plaintiffs, Including ODEs.

Petitioners acknowledge that under their approach, institutional entities involved in the legalization process (like plaintiffs Migration and Refugee Services and Haitian Refugee Center) could *never* obtain judicial review of allegedly unconstitutional or unlawful INS legalization policies, because there could never be "a determination respecting an application" for such institutions. Pet. Br. at 23. That does not mean that Congress intended to preclude judicial review under 28 U.S.C. § 1331 or 8 U.S.C. § 1329 for organizations suffering institutional injury as a result of unlawful INS policies. To the contrary, the point petitioners accept indicates that Congress must have intended to permit institutional plaintiffs *and* individual plaintiffs to bring this narrow category of federal claim.

As petitioners recognize, whether Congress intended institutional plaintiffs to have a statutory cause of action under the legalization program depends upon the legislative purposes and on whether Congress anticipated that those institutions would have any role in the statutory scheme. Pet. Br. at 24-25; see *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984). Petitioners rest their argument on the absence of any direct legislative evidence that Congress created an *express litigation* role for the QDEs and other institutional plaintiffs. Pet. Br. at 24. But that stands the presumption of judicial reviewability on its head; its premise is that *no* judicial review will be available for such plaintiffs absent express legislative statements conferring such right of review.[38] Moreover, petitioners ignore that the function that the institutional plaintiffs seek to serve in this litigation is precisely the function that Congress in IRCA created the QDEs to serve.

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[38] *Compare, e.g., Bowen v. Michigan Academy, supra*, 476 U.S. at 667, *aff'g*, 757 F.2d 91, 93-94 (6th Cir. 1985), where institutional standing was permitted despite the absence of any direct statutory reference to the Academy's right to pursue its separate institutional interests.

Congress required the Attorney General to designate various organizations as QDEs in order to overcome the alien community's natural fear of the INS and to encourage maximum participation in the legalization process.[39] Congress thus believed it necessary to create institutional buffer groups, with quasi-governmental status but strong ties to the alien community, to provide prompt accurate information to aliens, to treat their inquiries and applications in confidence, and to advise them and assist them *before* those aliens are called upon to decide whether to file formal applications for legalization.

Petitioners do not dispute that QDEs have institutional interests in addition to any interests that their alien applicant clients may have. See Pet. Br. at 23-27; Pet. App. 41, 41a, 43a.[40] Petitioners also do not dispute that Congress intended the QDEs to play a crucial statutory role. Pet. Br. at 6 n.5. The issue is simply whether there is "clear and convincing evidence" in the legislative record to overcome the presumption of judicial review for these organizations; *viz.*, that Congress intended QDEs to be denied all access to the courts even when their statutory functions were being directly undermined by the INS' allegedly unconstitutional or unlawful statutory policies.

Given the extensive and essential role of QDEs in the legalization process, the fact that Congress did not explicitly provide them with a role as "litigating ombudsmen" (Pet. Br. at 24) is of no relevance. Viewing the

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[39] *See* 8 U.S.C. § 1255a(c)(2); *see also supra* at 18-20. Petitioners concede as much. *See* Pet. Br. at 6 n.5.

[40] This includes their interests in providing timely, accurate information concerning the statutory legalization criteria (not only to serve the general legislative purposes, but also to promptly resolve any conflicts between their roles as agents of the INS and as representatives of their alien clientele), and in encouraging the widest number of potentially successful applicants to seek legalization (both for the aliens' sake, and because the QDEs are entitled to federal compensation for each successful application they process). *See, e.g., Ayuda, Inc. v. Thornburgh, supra*, 687 F. Supp. at 655-57.

statutory scheme and legislative purposes as a whole, it can most fairly be said that Congress intended them to have access to the courts to protect their own and their clients' interests. There is no clear and convincing evidence to the contrary.

2. Claims By Aliens Who Were Prevented By the INS or a QDE From Filing a Timely Legalization Application.

Although the issue does not arise in this case, many claimants challenging the INS' legalization regulations in district court have alleged that they were prevented from filing formal applications for legalization, by an LO or QDE acting as the INS' agent, on the ground that the challenged INS regulation made them ineligible and that application would be pointless.[41] Under petitioners' approach, these individuals would be unable to obtain *any* review of the underlying INS policy, because they were never allowed to file "an application." Again, petitioners point to no evidence that Congress intended to preclude judicial review for such persons. Nor is such an intent likely, since if class-wide injunctive relief in district court were available *prior* to the expiration of the

[41] *See, e.g., Vargas v. Meese, supra,* 682 F. Supp. at 591-93; *In Re Thornburgh, supra,* 869 F.2d at 1506, 1513-16. The records in those cases (and *Immigrant Assistance Project, LULAC* and *Catholic Social Services*) document numerous instances in which the INS offices, or the QDEs acting as the INS' statutory agents, mindful of the substantial expense (up to $420 per family) and obvious futility of filing an application that would automatically be denied under the existing INS eligibility guidelines, told potential applicants not to file an application, or discouraged them from doing so by informing them that such an application would not be accepted. *See also* INS Legalization Manual at IV-6 ("if the applicant is statutorily ineligible, the application will be rejected"); *id.* at IV-3, IV-6, IV-7 (showing that an application is "rejected" if it is turned down without processing and without acceptance of the filing fee); *cf.* S. Rep. 132, *supra,* at 47 (applicants who approach the QDEs "may apply to such entities without fearing that their applications will be forwarded to the INS even if in the view of such entities they do not qualify for legalization.").

application deadline, the INS could be required to accept those aliens' applications and to process them administratively under the correct statutory criteria—a result that is fully consistent with Congress' goal of encouraging applications from all potentially eligible legalization claimants.

Petitioners' approach would also preclude judicial review of claims by legalization applicants who were denied statutory employment authorization during the six to seven month period *prior to the start of the application period* on the ground that, under an allegedly unlawful INS legalization policy, they could not establish a *prima facie* or nonfrivolous claim for legalization. See 8 U.S.C. § 1160(d)(1)(B), § 1255a(e)(1)(B) (providing employment authorization to "an alien who is apprehended before the beginning of the application period . . . and who can establish a nonfrivolous case of eligibility to have his status adjusted . . . (but for the fact that he may not apply for such adjustment until the beginning of such period) . . ."). Under petitioners' construction, the wholesale denial of employment authorization to such aliens during the pre-application period could *never* be remedied, despite the obvious irreparable injury, because no legalization application had yet been denied.[42]

[42] If petitioners were to agree that the district courts *could* assert jurisdiction over pre-application claims for employment authorization (as did the court in *Catholic Social Services v. Meese, supra,* 664 F. Supp. at 1380-81, which involved a challenge to an INS regulation that resulted in the exclusion of potential SAW applicants prior to the start of the application period), that would be all the more reason to conclude that Congress intended to permit district court review over *post*-application period constitutional and statutory challenges to the INS' legalization policies as well. *See Ayuda, Inc. v. Thornburgh, supra,* 880 F.2d at 1337-38 n.13 (noting that since a denial of asylum "might be reviewable before deportation proceedings, the argument that denials during the proceedings are not separately reviewable rests on less powerful—if not insignificant—grounds."), *citing Foti v. INS, supra,* 375 U.S. at 229, and *UAW v. Brock, supra,* 477 U.S. at 294 (White, J., dissenting).

The dilemma faced by these individuals points up a substantial flaw in petitioners' analysis, which would allow the INS to violate the statutory and constitutional rights of persons whom Congress intended to benefit from legalization as long as the INS did so in a manner that prevented them from formally applying for legalization. For example, where the INS refused to accept applications from aliens who did not satisfy the agency's unlawful eligibility regulations (or where the INS barred applications from persons born in a certain country, or who spoke a particular language, or had worked on a particular farm or crop), under petitioners' construction that blatantly unlawful policy would be immune from judicial challenge, despite those individuals having satisfied the statutory eligibility criteria as properly construed. Surely Congress did not intend to clothe the INS with authority to engage in such unlawful policymaking, any more than it intended to deny access to the courts for aliens who, because they were ineligible under the INS' unlawful legalization guidelines, were prevented by the INS or a QDE from filing a formal legalization application.

3. Petitioners do not point to any persuasive evidence of congressional intent to support their construction of the IRCA review provisions. Rather, petitioners' argument is essentially a series of reasons why Congress lawfully *could* have included such claims within the scope of 8 U.S.C. § 1160(e). But absent evidence that Congress *did* have such an intent, whether Congress had the power to enact such a provision is irrelevant. Much more is required to overcome the compelling evidence—based on the statutory language and consistent legislative policies—that Congress did *not* intend in IRCA to eliminate the district courts' traditional jurisdiction to adjudicate challenges to unlawful or unconstitutional agency action.

CONCLUSION

For the reasons stated, *amicus* AFL-CIO requests this Court to affirm the decision of the Eleventh Circuit.

Respectfully submitted,

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